sell and an imperative direction to sell. That there is a clear distinction is well settled.[1]

Each may be coupled with a trust to pay debts or charges, but a discretionary power to sell is not, merely by coupling it with such a trust, thereby converted into an imperative direction to sell "out and out," especially when it is manifest that the primary object of the grantor of the power is not to convert the land into money, but is to pay debts or other charges, and such object may be accomplished with better advantage to the estate by a mortgage. In such case, particularly if the power is given by a will, such a construction should be adopted as will most effectually carry out the primary object of the testator; and if, under the circumstances of the particular case, this can be done with more advantage to the estate by a mortgage than by a sale, then the power to sell should be construed as discretionary and not as imperative.

That a power to sell, though coupled with a trust to pay debts or other charges, does not *prima facie* imply a power to sell "out and out" is shown by the recent decision of the Supreme Court of the United States in Phelps *v.* Harris,[2] where it was held that a power to "sell and dispose of" property implied a power to make *partition* of it between the beneficiaries, even though there was a further direction to "invest the proceeds."[3]

Supreme Court of Pennsylvania.

ROBB *v.* CARNEGIE BROS. & CO., LIMITED.

Sic utere tuo ut alienum non laedas—When equity will restrain defendant in the use of his own land—when plaintiff's only remedy is at law—Private industry not entitled to the immunities of a public servant—Measure of damages—Natural use of land.

[1] 2 Perry Trusts (4th ed.), Sec. 507. [2] 101 U. S., 370.

[3] To the same effect is the recent English case of Frith *v.* Osborne, L. R. 3 Ch. Div., 618; S. C. 18, Eng. Rep., 724.

Where a defendant on his own land engages in an industry which causes physical injury to the adjoining land of the plaintiff, the defendant must respond in damages if the industry has no natural connection with the soil or the subjacent strata.

Therefore, where the defendant's coke-oven emitted fumes which impaired the plaintiff's crops, it was held to be no defence to an action at law to aver that the site for the oven was selected with care, and that no land was better adapted for coke-burning than the land in question.

It seems that on such a state of facts equity would refuse to interfere by an injunction, since such interference would amount to a suppression of the coke industry.

But while equity will recognize the importance of such an industry by refusing to suppress it, the law, in spite of the importance of the industry, will treat it as a private enterprise, and will deny to it those immunities which belong of right only to railroads and other public servants.

The measure of damages in such case is not the same as in condemnation proceedings, but is solely the actual harm which has resulted to the plaintiff from the operation of the defendant's industry.

Appeal of Carnegie Brothers & Co., Limited, defendants, from the judgment of the Common Pleas of Westmoreland County in an action on the case brought by Adam Robb to recover damages for injuries alleged to have been sustained in respect of his property by reason of the operation of defendants' coke-ovens, from which ovens offensive fumes, smoke and dirt were poured upon his premises.

It appeared upon the trial that the plaintiff was the owner of a farm adjoining the tract upon which the defendants' ovens were situated. He had acquired the greater part of the farm prior to the defendants' purchase of their tract, and had secured the residue more recently. The plaintiff's witnesses testified that the soil on his farm was limestone, part black loam, and all good. The defendants' witnesses declared that it was "second-rate" soil and far below the average of that found in Westmorland County's agricultural districts. The defendants' tract consisted of about twenty acres of low ground, swampy, unfit for cultivation, and overgrown with underbrush, willows and sycamores. This piece of ground lay three hundred feet below the plaintiff's land and nine hundred feet below the brow of the hill where the plaintiff's arable land began. It was a secluded place, but well adapted for coke-burning by rea-

son of its proximity to certain coal mines with which there was convenient railroad communication. On this tract the defendants erected coke-ovens and machinery of the most improved kind to the value of $200,000. The plaintiff made no objection to the building of the ovens, but actually assisted in the work.

The plaintiff called witnesses who proved a gradual diminution of crops for six years prior to the bringing of suit. There was also testimony to the effect that the plaintiff had lost timber and fruit trees, and that crops had grown to a certain height and, in spite of fertilizers and manure, had then died. Evidence was offered on behalf of the plaintiff that damage to the extent of $10,000 had, in witness's opinion, been done to plaintiff's property by the erection of the ovens and by the smoke. The admission of this testimony was made the subject of the second assignment of error. Witness was also asked what, in his opinion, was the market-value of the plaintiff's property as affected by defendants' ovens. An objection to the question was overruled, and the witness was permitted to answer. Third assignment of error. Witness was further permitted to testify that, in his opinion, plaintiff's farm could (but for the ovens) be utilized for fruit growing. Objected to as irrelevant, both because it had no relation to *actual* damage and because, in point of fact, an orchard was planted on the farm, and the fruit-bearing qualities of the trees were in evidence. Objection overruled. Ninth assignment of error.

The only other assignments commented upon by the Court (the seventh and the twelfth) are sufficiently set forth in the opinion.

Verdict for plaintiff for $4,798.10. A motion for a new trial was refused, and defendants took this appeal.

Paul H. Gaither, *Esq.*, and *John F. Wentling*, *Esq.*, (*J. A. Marchand*, *Esq.*, and *D. A. Miller*, *Esq.*, with them), for appellants.

George Shiras, *Jr.*, *Esq.*, *W. F. McCook*, *Esq.*, *P. C. Knox*, *Esq.*, and *James H. Reed*, *Esq.*, representing various coke companies, filed an intervening argument on behalf of appellants.

James M. Peoples, Esq., (*D. S. Atkinson, Esq.*, with him), for appellees.

OPINION OF THE COURT.

Opinion of WILLIAMS, J. October 5, 1891.

This case was tried with considerable care in the Court below, and was in most respects well tried. Some questions were, however, raised and considered on the trial which were not necessarily involved, and which hindered, rather than helped, the Court and jury in reaching a correct result. For this reason, and because the case as it is presented is one of considerable general importance, it seems desirable that the position of the parties, and principles by which their relative rights are to be adjusted, should be briefly considered. This may be done by answering the following questions: First, has the plaintiff shown a cause of action for which he can recover in a court of law? Second, if he has, what is the measure of his damages? Third, was the evidence which was admitted under objection relevant to the issue before the jury?

The plaintiff shows that, prior to 1871, he was the owner of a farm in Westmoreland County, on the uplands north of Brush Creek. His cultivated fields began about 1,000 feet from and about 300 feet above the stream, and extended back to and beyond his dwelling and farm buildings, which were about one-half mile from the stream. He shows that, in 1871, the defendants bought a tract of land in the valley, and extending up the slope some 300 or 400 feet, on which they erected coke-ovens on the flat on the north side of the creek. He alleges that the smoke and gas from these ovens pass over his farm, injuring thereby his crops, diminishing the productiveness of the soil and the desirability of his house as a place of residence. Evidence was given on the trial in support of this allegation. The defendants deny that the plaintiff has suffered injury in his crops, his soil or the comfort of his home, and they further deny that the injuries alleged, if actually sustained, would entitle the plaintiff to recover, and for this they give the following reasons: (*a*) such injuries are the natural and

necessary result of the development by the owner of the resources of his own land, as in Sanderson *v.* the Coal Company;[1] (*b*) they result from a reasonable use of his own land for a lawful purpose, as in Huckenstein's Appeal;[2] (*c*) they result from the pursuit of a lawful calling in a lawful manner, without either negligence or malice on the part of the owner or his employees, as in Lippincott *v.* the Railroad Company.[3] In Sanderson's case the land of the Coal Company was coal land, its value could be realized by the owners in no other way than in bringing the coal to the surface so that it could be prepared for the market. In the process of mining, subterranean veins of water are necessarily opened, and the water accumulating in the mines must be brought to the surface, where it naturally finds its way into surface streams and pollutes them. If this could not be done a great industry would be interfered with, and the owner of the coal land denied the rights of ownership of his land for the benefit of a neighboring owner whose title was no greater or higher than his own.

The maxim, "*Sic utere tuo ut alienum non lædas*," was, therefore, neither suspended nor modified in Sanderson's case.

The Coal Company was using its own land in the only manner practicable to it. The harm done thereby to others was the least in amount consistent with the natural and lawful use of its own. If this use was to be denied to the Coal Company because some injury or inconvenience to others was unavoidable, then the result would be practical confiscation of the coal lands for the benefit of householders living on lower ground. But the defendants are not developing the minerals in their land or cultivating its surface. They have erected coke-ovens upon it and are engaged in the manufacture of coke. Their selection of this site rather than some other is due to its location and to their convenience, and has no relation to the character of the soil or to the presence or absence of underlying minerals. The selection was, no doubt, a wise one, quite se-

[1] 113 Pa., 126. [2] 70 Pa., 102. [3] 116 Pa., 472.

cluded and quite convenient to the several mines from which the materials were to be obtained for the making of coke, but it was the selection of a manufacturing site, and is subject to the same considerations as if glass or lumber or iron had been the commodity to be produced instead of coke. The rule in Sanderson's case has, therefore, no application to the facts of this case. The injury, if any, resulting from the manufacture of coke at this site is in no sense the natural and necessary consequence of the legal right of the owner to develop the resources of his property, but is the consequence of his election to devote his land to the establishment of a particular sort of manufacturing, having no natural connection with the soil or the subjacent strata. The rule in Huckenstein's Appeal is equally inapplicable. The land of the appellant in that case had upon it a deposit of fine brick clay which could be made into bricks with profit, if this was done near the pit from which the clay was taken. This is the usual, and probably a necessary, way of converting the clay into brick. An effort was made to enjoin against the burning of the brick by Huckenstein on the field where the clay was obtained. The injunction was refused, and it was held that upon the case as presented Huckenstein was making a reasonable use of his own land which equity would not interfere with. Whether he would have been liable in an action at law for any substantial injury he might do to a neighbor by the burning of bricks, was not before the Court, and was not considered. We think it is true, as held by the Judge of the Court below, that the evidence in this case would not justify an injunction. It shows a selection of a site as well adapted to the business and as remote from dwellings as any in that region. To enjoin the manufacture of coke at such a site would amount to a prohibition of its manufacture, and the destruction of vast allied and dependent industries of immense value to the public, as well as to those directly engaged in them. An injunction is not of right, but of grace, and will never be issued by a court of equity when it will inflict a greater injury than it will prevent. In such a case the injured party will be left to his redress

at law. No more than this is fairly covered by Huckenstein's case. The plaintiff in this case is, therefore, in the right court, and if he is substantially hurt by the use to which the defendants have seen fit to devote their land, we see no reason why he may not recover, unless it is found in the last of the positions taken by the defendants, for which Lippincott's case is cited.

It is a fundamental principle of our system of government that the interest of the public is higher than that of the individual, so that, when these interests are in conflict, the latter must give way. If the individual is thereby deprived of his property without fault on his part, he is entitled to compensation; but if he is affected only in his tastes, his personal comfort, or pleasure, or preferences, these he must surrender for the comfort and preferences of the many. Thus highways are necessary to the public business and comfort. Some noise and dust are necessarily occasioned by the legitimate use of them. This may be disagreeable; perhaps, in some cases, positively harmful to some one or more of the persons living along them; but for this there is no remedy at law or in equity. It is one of the necessary consequences of subjecting the individual to the public in those things as to which their interests are in conflict. Railroads have become the great highways of travel and commerce. The turnpike and canal have been superseded, and the people and their products are transported at a great advance in speed and comfort over the modern highway by the power of steam. The law recognizes the public character of these highways. Their presence is necessary to the prosperity and comfort of the public. To some persons who live near them, as to some persons who live upon a busy city street, the incessant roar of business and the dust of passing vehicles or trains may be unpleasant or painful, but whether such persons live upon a country road, a paved street, or a railroad, they are alike remediless. No action will lie against the municipality, the turnpike or the railroad company for the noise and dust caused by the legitimate use or operation of the highway in either case. For negligence or malice, the

wrongdoer is liable to the party injured; but for the lawful use of the road in the customary manner, no liability attaches to the traveller or owner. The railroads are built, as is the turnpike or the street, under laws regulating their construction and use, in the interest of the public which is to be served by them. The right to operate railroads is a necessary incident to the right to build them, and this was held in Lippincott's case. But the production of iron or steel or glass or coke, while of great public importance, stands on no different ground from any other branch of manufacturing or from the cultivation of agricultural products. They are needed for use and consumption by the public, but they are the results of private enterprise, conducted for private profit and under the absolute control of the producer. He may increase his business at will or diminish it. He may transfer it to another person or place or State, or abandon it. He may sell to whom he pleases, at such price as he pleases, or he may hoard his productions and refuse to sell to any person at any price. He is serving himself in his own way, and has no right to claim exemption from the natural consequences of his own acts. The interests in conflict in this case are therefore not those of the public and of an individual, but of those of two private owners, who stand on equal ground as engaged in their own private business. Lippincott's case is, therefore, no reply to the plaintiff's case.

What, then, is the measure of damages? The declaration charges an injury to the trees and crops growing on the surface, and a permanent injury to the soil by the deposit upon it from the passing smoke and gas of sterilizing and poisonous substances. To the first of these the statute of limitations was properly applied. During two of the six years open to inquiry the farm was in possession of a tenant who paid what is admitted to have been a full rent for it. The crops for those two years should, therefore, be excluded from consideration. As to the remaining four years, if the crops were so affected as to reduce their quantity or value, the shrinkage upon each year's crops should be shown in bushels or tons, or approximated as

nearly as possible. For the acreage in wheat or corn in any one of these four years, for example, being shown, and the yield per acre, a comparison of the crop with that raised on the same before the ovens were built, could be made, and, so far as the difference was shown to be due to the smoke or gas, it would afford some basis for an estimate of the damage sustained on that year's crop. In this manner the actual injury to the crops, if any, could be gotten at pretty nearly. As to a permanent injury to the soil by the deposit of injurious particles upon it, a chemical analysis will afford the only safe guide. Differences in the amount of the crop might be due to the effect of the smoke on the growing plant, to negligent tillage, to exhaustion of the soil by long cropping, or from many other causes; but if, as some of the witnesses have testified, a crust of foreign and sterilizing substances has been deposited over this farm, varying from a quarter to a third of an inch in thickness, specimens of it can and should be produced, and its composition, and the effect of its presence, ascertained and explained to the jury by those competent to speak on the subject. This is a question susceptible of a clear and satisfactory solution by the application of scientific tests, which the Court and jury should have the benefit of. If the result is to show a permanent injury to the soil, which impairs its productiveness to an appreciable degree, the extent of the loss in the value of the farm can be readily computed. If such permanent impairment is not made to appear, this part of the plaintiff's claim should be rejected altogether. The fact that the plaintiff may regard his farm as less desirable than before, because of the proximity of an undesirable business, or an undesirable neighbor, or the further fact that its selling value has been reduced by reason of such proximity, affords no ground for a recovery. The location of a livery stable, a restaurant, a distillery, and many other kinds of business, close to one's home, might diminish its comfort and its market value, but the owner would be without legal redress so far as the effect of proximity is concerned.

If, however, the business was so conducted as to affect

the use of adjoining property or the health of its occupants, these tangible and substantial injuries, capable of measurement by a pecuniary standard, might sustain an action for damages. The ordinary rule for the ascertainment of damages where land has been entered and appropriated under the right of eminent domain, does not furnish a measure of the plaintiff's right to recover in this case, for the reason already given. Where an entry and seizure has been made, the effect of the seizure and appropriation of the part of the land of the owner to a particular use is to be considered, as well as to the value of what is taken. This can be best adjusted by ascertaining the selling value of the whole property before the entry, and after it has been made. The difference, if any, shows the actual loss which the owner has suffered. But in this case there has been no entry upon, or appropriation of, the plaintiff's land. What he alleges is that the prosecution of the business of making coke by the defendants on their own land has hurt his crops and injured his soil. They have the right to make coke. If the establishment of that business near the plaintiff affects the selling value of his farm, he can no more recover for that than he could recover against the saloonkeeper or the liveryman, because the location of their business near him had made his property unsalable. The nature of the business is therefore to be left out of the view. The sole question is, What harm has been done the plaintiff by, or as the direct result of, the prosecution of the defendants' business at a place where they had a legal right to carry it on? The plaintiff might honestly think, and his neighbors might be willing to testify, that the mere location of the ovens on adjoining land reduced the value of his farm thirty or fifty per cent., or more, and a comparison by them of the value before and after the building of these ovens would include this element, for which there can be no recovery. What has been now said substantially disposes of our question relating to the testimony objected to. The second assignment of error is sustained. The question objected to should have been excluded because it called for no fact, but for a lumping estimate, which opened the way

for the witness to introduce considerations that we have seen had no place in the adjustment of the damages.

The question referred to in the third assignment should have been excluded, for reasons already given. The seventh assignment is also sustained. It was of no sort of consequence where the defendants obtained the material which they used in making coke, or what price they paid for it, or what the miners who brought it to the surface were paid for mining it, and such questions should have been excluded. The ninth assignment must also be sustained. The question was not what purposes the plaintiff might have devoted his farm to, and what damages he would have sustained in that case, but to what purposes had he devoted it, and to what extent had he been interfered with by the defendants' business.

An examination of the evidence shows that the plaintiff purchased his farm, containing eighty-two acres, for $4,000, a few years before the ovens were built. Several years after they were built he bought twenty acres adjoining, which contained coal, which he mined and sold to the employees of the defendants. So far as the evidence indicates, the latter piece was not farmed, but kept and used for mining coal.

For the injury to four years' crops, and for permanent injury to his soil, the plaintiff recovered nearly $1,000 more than his farm cost him, and still finds it to his advantage to reside upon it and to cultivate it. The fact that such a verdict was rendered shows that the Court and jury must have been misled, to some extent, by the irrelevant testimony and by the improper measure of damages which the jury was left to apply.

It only remains to consider briefly the twelfth assignment of error. The learned Judge said to the jury: "After much thought, we have arrived at this conclusion: First, that the owners of coal land may develop and operate the same, even to the injury of adjoining land-owners, without remedy on the part of the latter, unless malice or negligence be shown; second, that a court of equity will not restrain the operation of works of an injurious nature where

the best possible place to do the least injury to others has been selected; third, that while equity will not restrain, law will give a remedy where actual, positive, serious injury has been done to another by bringing upon adjacent lands, and manufacturing, material not part of the land, whether such harm be done to health or property." We cannot see that the appellants were hurt by this instruction. The first proposition is no more than a statement of the rule which was held in Sanderson's case. The second is all that the appellants could ask, and, as a general rule, is well settled. If there is any error in the third, it is in the concession that the mine-owner is under less obligation to his neighbors when he makes coke upon the tract from which the coal is mined than when he makes it elsewhere. If this concession was mistaken, as perhaps it was, it did not lay any burden on the appellants, and they have no right to complain of it. Whether one who mines coal, or petroleum, or lead, on his own land has, by virtue of that fact alone, a right to manufacture or refine such product on the tract from which it was obtained under circumstances which would prevent its manufacture or render him liable for damages if he manufactured on some other tract, is a question not raised by the facts of this case. If the relation of the miner to his product, or the surface to the underlying materials, could confer exemption from liability for the consequences of the manufacture of the material, mined where the process was conducted on the same tract, the defendants were not within range of such exemption. They did not mine the coal they used. It was not mined upon the land upon which the coke-ovens stood. They were, therefore, under the general rule, and not within the exemption, if such exemption really exists. At the same time the location of these parties and the industries of the region are not to be lost sight of. The plaintiff's farm is in a region in which bituminous coal is obtained in large quantities. He himself mines coal upon his own land for sale. The conversion of coal into coke, to supply fuel for the great iron and steel mills of Western Pennsylvania, is one of the greatest industries

of the region. Many millions of money are invested in it, and many thousands of men are employed about its production. It has been largely instrumental in the development, growth and general prosperity of the region. The plaintiff shares the general benefits, and seems to possess some advantages that are special and grow directly out of the establishment of these works near him, for he has been thereby provided with customers for his coal and his farm-products at his own door.

These considerations should be borne in mind in adjusting the damages, if any have been sustained, so that the plaintiff, while he recovers for his actual loss in the products of his farm, or the destruction of his soil, as the evidence may show the facts to be, shall not be allowed exemplary damages, and so that the defendants shall not be treated as wrongdoers in the establishment of their plant on a well-selected and secluded tract of land belonging to themselves.

As this case goes back for a new trial, it is quite proper for us to add that the trial judge is, in an important sense, the thirteenth juror, and when the amount of the verdict shows that it must have been arrived at by the adoption of an erroneous measure of damages, or a mistake in computation, he should not hesitate to set it aside.

The judgment is reversed, and a *venire facias de novo* is awarded.

The principal case is a valuable addition to the long line of decisions which explain and qualify the oft-quoted maxim: *Sic utere tuo ut alienum non lædas.* To what extent is one to be restricted in the use of his own land by the prohibition "Thou shalt do no hurt to thy neighbor"—a prohibition which lies at the very foundation of the law of Torts? Pollock on Torts,* 12. This is the question which the courts are constantly called upon to answer, especially in cases which, like the principal case, involve large commercial interests and great sums of invested capital. Indeed, the pecuniary or commercial importance to one litigant of a decision favorable to himself often so clearly outweighs the disadvantage and discomfort which would in that event be caused to his adversary, that the courts are always tempted to give controlling weight to what may be called the "argument of expediency," and in some instances they have yielded to the temptation. But in general the courts have looked beneath the

surface of the question before them and beyond the facts in a particular case, and have recognized that the point for decision is not, in a given case, whether a great industry shall be sacrificed to a neighbor's whim, but whether or not the act of which the plaintiff complains is a violation of the sacred property-rights of a fellow-citizen. Accordingly, our readers cannot fail to read with especial satisfaction that portion of the opinion of Mr. Justice WILLIAMS, in which, after admitting that in proper cases the individual must yield his interest to the public good, he uses the following significant language: "But the production of iron or steel or glass or coke, while of great public importance, stands on no different ground from any other branch of manufacturing, or from the cultivation of agricultural products. They are needed for use and consumption by the public, but they are the result of private enterprise, conducted for private profit and under the absolute control of the producer. He may increase his business at will or diminish it. He may transfer it to another person or place or State, or abandon it. He may sell to whom he pleases, at such price as he pleases, or he may hoard his productions and refuse to sell to any person or at any price. He is serving himself in his own way, and has no right to claim exemption from the natural consequences of his own acts. *The interests in conflict in this case are, therefore, not those of the public and of an individual, but those of two private owners, who stand on equal ground as engaged in their own private business.*"

This portion of the decision is valuable from the fact that it does away with extraneous matters which might influence the judgment, and makes it possible to examine the point of law which the case really decides. That point, as stated above in the syllabus, is that where the defendants' coke-oven emits fumes which impair the plaintiff's crops, it is no defence to an action at law to aver that the site for the oven was elected with care, and that no land was better adapted for coke-burning than the land in question.

The reason for this decision is well expressed in the judgment of the Exchequer Chamber in Fletcher *v.* Rylands (L. R. 1 Ex., p. 278). In the course of his opinion, which was in terms adopted by the House of Lords, BLACKBURN, J., said: "The person whose grass or corn is eaten down by the escaping cattle of his neighbor, or whose mine is flooded by the water from his neighbor's reservoir, or whose cellar is invaded by the filth of his neighbor's privy, *or whose habitation is made unhealthy by the fumes and noisome vapors of his neighbor's alkali works*, is damnified without any fault of his own, and it seems but reasonable and just that the neighbor who has brought something on his own property, which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbor's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there, no mischief could have accrued; and it seems but just that he should at his peril keep it there so that no mischief may accrue, or answer for the natural or anticipated conse-

quences. And upon authority, this, we think, is established to be the law, whether the things so brought be beasts, or water, or filth, or stenches."

Although some emphasis is here laid by the learned judge upon the bringing of the injurious agency upon defendants' land, it is clear that the liability of the defendant is not understood to depend upon such a state of facts. Indeed, in Fletcher *v.* Rylands the defendant did not bring the water upon his own land; it flowed there naturally, and all he did was to utilize it by the construction of a reservoir. See the report of the case in 3 Hurlstone & Coltman, 786. Accordingly, effect must be given to the language of Lord CRANWORTH in the House of Lords: "If a person brings *or accumulates* on his land anything which, if it should escape, may cause damage to his neighbors, he does it at his peril." The reason for the decision, then, rested upon the fact that the defendant had *accumulated* water for the purposes of a reservoir, which, as Lord CAIRNS pointed out, was "a non-natural use" of the land. Fletcher *v.* Rylands and the principal case are, therefore, both authorities for the proposition that a defendant will be liable for damage caused by the escape of a substance (water in the one case, and coke fumes in the other), *provided* the substance is not liberated in the course of a natural user of his land by the defendant. The question whether or not the elements of a nuisance were present in one case and not in the other, does not concern us now. The question at once arises, What *is* a natural user of land? In addition to deciding that coke-burning is *not* a natural use, the Court, in the principal case, in referring to its own earlier decision in Penna. Coal Co. *v.* Sanderson, 113 P. S., 126, incidentally decided what *does*, in its judgment, constitute such a use. "In Sanderson's case," says WILLIAMS, J., "the land of the Coal Company was coal land. Its value could be realized by the owners in no other way than by bringing the coal to the surface, so that it could be prepared for the market." Again, in referring to the case before him, the learned Judge remarked: "But the defendants are not developing the minerals in their land or cultivating its surface." And again: "The injury, if any, resulting from the manufacture of coke at this site, is in no sense the natural and necessary consequence of the exercise of the legal rights of the owner to develop the resources of his property, but is the consequence of his election to devote his land to the establishment of a particular sort of manufacturing, having no natural connection with the soil or the subjacent strata." It seems, therefore, that a use of land to be a natural use must have a necessary connection with the soil or the subjacent strata. This statement is substantially in harmony with the language of Lord CAIRNS in Rylands *v.* Fletcher (L. R. 3 E. & I. App. Cases, p. 339). Now, the purpose of determining in a given case whether a use of land is natural or not is, generally speaking, to ascertain to what extent the end which the defendant has in view justifies the means; or, rather, to ascertain whether or not the defendant is liable for the *results* of the means which he employs. Thus, in Rylands *v.* Fletcher (*supra*), and in the principal case, as soon as it appeared that the use was non-natural, the Court found

no difficulty in holding the defendant liable for damage actually done, although the damage followed inevitably from the use.

Is the converse of this rule sound law? Does the fact that a use is natural justify acts which cause damage merely because the acts are essential to the use? An examination of the cases seems to show that there is a conflict of authority on this point. Generally, it may be said, the converse of the rule does not hold good. The weight of authority is to the effect that acts done in the natural use of land which cause damage to the property of a neighbor are protected only when the damage results from the operation of purely natural forces upon the injurious substance. Or, to say the same thing in other words, a plaintiff cannot complain of the injuries which result when natural forces, acting upon the injurious substance, cause it to leave the position which it occupied when found by the defendant and cause it to come in contact with the plaintiff's property. In short, the immunity of the defendant depends upon the presence of two elements: (1) the use of his land must be natural; (2) the agency which transports the injurious substance from its original position to the plaintiff's property must also be natural. The question has usually arisen in reference to the mining of coal; and the earliest case on the subject, Smith *v.* Kenrick (7 M. G. & S., 515; 62 E. C. L., 1849), involved the rights of owners of adjoining collieries.

In that case the defendant's colliery adjoined the plaintiff's, but was situated upon a higher level. One consequence of this fact was that a large body of subterranean water was prevented from flowing into the plaintiff's workings only by a large horizontal bar of coal, all of which bar was part of defendant's colliery. A corresponding barrier upon the plaintiff's land had previously been removed by a trespasser, so that the defendant's barrier was the plaintiff's only protection. The defendant, although he knew what the result would be, proceeded to remove this bar for the purpose of obtaining coal, and so working his mine in the manner most advantageous to himself. As soon as the bar was removed the water flowed into the plaintiff's mine, and he forthwith brought his suit. But the Court held that if the plaintiff's barrier had not been removed he would have been as amply protected as if the defendant had not removed his, and that the defendant, as he might then have mined up to the very boundary line, could not now be restricted in consequence of an act for which he was not responsible. He was therefore discharged from liability; and this decision was said to be in harmony with the civil law by which it was considered that land on a lower level owed a natural servitude to that on a higher, in respect of receiving, without claim to compensation, the water naturally flowing down to it (Dig. Lib. 39, tit. 3). That the decision is a direct authority for the statement of the law as made above appears from the language of CRESSWELL, J., in contrasting the facts before him with those in Haward *v.* Bankes (2 Burr, 1113). Says the learned Judge (p. 563): "There can be no doubt that a man may cause water to flow from his own premises into his neighbor's so as to make himself liable to an action. . . . . In this case it ought not to be said that

he *caused*, but that he *permitted*, the water to flow into the plaintiff's mine."

In Baird *v.* Williamson (15 C. B. [N. S.] 376; 108 E. C. L., 1864), the defendant and plaintiff were owners of adjoining mines, the mine of the former being, as in Smith *v.* Kenrick, on a higher level. Water came into the plaintiff's mine from two sources, and for one the defendant was held liable, and for the other he was not. This is therefore a peculiarly instructive case. Part of the water flowed from openings made by the defendant on his own premises for the purposes of obtaining the mineral, and as to this the Court said (p. 390): "The owners of the higher mine have a right to work the whole mine in the usual and proper manner, for the purpose of getting out any kind of mineral in any part of that mine; and they are not liable for any water which flows by gravitation into an adjoining mine from works so constructed." Part of the water came from a source lower than the plaintiff's mine, but was raised by pumps to a higher level, so as to enable the defendant to reach other mineral lying at a greater depth. Referring to this the Court says (p. 391): "In respect of this water we think the action lies. The defendants, as occupiers of the higher mine, have no right to be active agents in sending water into the lower mine. . . . . If, while the occupier of a higher mine exercises that right [*i. e.*, the right to mine minerals in the usual way], nature causes water to flow to a lower mine, he is not responsible for this operation of nature."

Crompton *v.* Lea (L. R. 19 Eq., 115, 1874) was a case in which the plaintiff's bill alleged that the defendants, in operating the mine, proposed so to excavate as to admit the waters of the river Douglas, which would inevitably flow through the workings of the defendants into the plaintiff's mine. The bill further alleged that the proposed excavation was not for any legitimate mining purpose, and as this allegation was confessed by the defendants' demurrer, the demurrer was overruled. This case is therefore an authority for the statement as above made, that both the elements of immunity must be present; not only must the influx of water be produced by natural forces, but it must be in the course of a user which is legitimate and natural. In Smith *v.* Fletcher (L. R. 9 Ex. 64, 1874) a defendant in working his mine made cuts to carry surface water, which but for the cuts could never have reached the plaintiff's mine. In consequence of exceptionally heavy rains, the water, under the operation of the law of gravitation, found its way into the plaintiff's mine, and the Court (reversing the trial judge) held that it was a question for the jury whether the mode of working the mine was reasonable and proper.

In Wilson *v.* Waddell (L. R. 2 App. 95, 1876) it was distinctly stated in the House of Lords by Lord BLACKBURN that the question before the Court in Smith *v.* Fletcher and Compton *v.* Lea was not involved in the case under consideration. So no difficulty was felt in deciding that the defendant was discharged from liability where mineral workings had caused a subsidence of the soil and a consequent shedding of rainfall into the plaintiff's lower coal field.

In West Cumberland Iron and Steel Co. *v.* Kenyon (L. R. 11 Ch. Div., 1879) there was a substantial

recognition of these principles. The case itself was a curious one, because, although it was admittted that the defendant's operation was not in the due course of mining, it was yet contended on his behalf that no more water had, as a consequence of his act, found its way into plaintiff's mine than would have flowed there if his act had not been done at all.

The Court was of opinion upon the evidence that such was the fact, and JAMES, L. J., in stating the limitation on the defendant's right to deal with water in his mine, used the following language (p. 786): "When he ceases dealing with it on his own land, ... he is not to allow or cause that water to go upon his neighbor's land in some other way than the way in which it had been affected before."

The principles which underlie these cases are not, to the writer's knowledge, questioned in any jurisdiction excepting *Pennsylvania*. In that State the Supreme Court has gone the full length of declaring that wherever the defendant makes a natural use of his land he is not liable for damages which inevitably result from that use. This, it will be observed, is the converse of the rule recognized in Rylands *v.* Fletcher and in the principal case. Accordingly the elements of a defendant's immunity in *Pennsylvania* must be said to be (1) that the use of the land shall be natural; (2) that the act causing damage to the plaintiff should be necessary to the use. It is not sufficient to show that the injurious act is one which is advantageous to the defendant, or that it will facilitate his operations: it must be necessary and unavoidable.

This doctrine was first announced in the well-known case of the Penna. Coal Co. *v.* Sanderson (113 P. S., 126, 1886). This case had come before the Court three times before, and on each occasion the decision was favorable to the plaintiff. Finally, however, the earlier decisions were overruled, and the Court, by a majority of four judges to three, established the doctrine as above outlined.

In that case the plaintiff depended for a portion of his water supply on a stream which had its source in a swampy region at the bottom of the slope on which the defendant coal company subsequently sank its shaft. In mining for coal, large quantities of mine water were encountered, and it became necessary to remove the water or to stop the work. As the water would not flow away under the operation of natural forces, it became necessary to use artificial means of getting rid of it. Accordingly pumps were called into requisition, and the water was thus raised to the mouth of the shaft. There all interference with it ceased, It was allowed to take its course, and, flowing naturally down the slope, it contaminated the sources of the plaintiff's stream, which thus became unfit for use. The Court upon these facts decided that the plaintiff's *damnum* must be considered as *absque injuria*. All the English cases summarized above were referred to by the Court, and so much of the decisions as related to the natural use of land was approved. But the Court did not hesitate to depart from them where it became necessary to justify the use by the defendants of artificial means of disposing of the water. The Court declared that the defendants had a right to rid the mine of water, pro-

vided that they led it "into the streams which form the natural drainage of the basin in which the coal is situate, although the quantity as well as the quality of the water in the stream may thereby be affected" (p. 149).

It thus appears that not only did the Court realize the necessity of confining the right of the defendant to acts absolutely unavoidable in the natural use of the land, but they were compelled to define the meaning of "unavoidable." It was argued that the defendant might have dug a tunnel to another basin, or made a surface-drain to some distant point, but the Court perceived that such a course would only transfer the injury instead of preventing it. Perhaps, also, the danger of sanctioning such a device impressed them So they decided, as indicated in the last quotation, that no cause of action would accrue to one who suffered loss in consequence of the operation of natural forces upon water which had been raised to the *mouth* of the mine, the earlier cases having limited the immunity to the operation of those forces upon the water where it was first discovered. No valid reason occurs to the writer why gravity should be selected as the factor by which to determine who should bear the loss when once an artificial agency has intervened. But probably the result will, in the long run, be as satisfactory as if any other arbitrary determining factor had been selected. Unfortunately, however, the appeal to a "natural" force left room for the contention made by the Court that the decision was in harmony with the current of English authority already considered.

The limitation of the effect of the decision in the Sanderson case was recognized by the same court in Collins *v.* Chartiers Valley Gas Co. (131 P. S., 143), and the reader will note the language of WILLIAMS, J., in the principal case in referring to the Sanderson decision: "In the process of mining, subterranean veins of water are necessarily opened, and the water accumulating in the mines must be brought to the surface, where it naturally finds its way into the surface streams and pollutes them. If this could not be done, a great industry would be interfered with, and the owner of the coal land denied the exercise of the rights of ownership on his land for the benefit of a neighboring owner whose title was no greater nor higher than his own."

This, then, is in outline the present state of the law relating to the natural use of land. Criticism is foreign to the province of the annotator, but it may be proper to suggest that there is here the material for a valuable essay. Such an essay might, among other things, re-examine the legal significance of the term "the *natural* use of land." If the Sanderson decision is adhered to, it may hereafter be necessary to hold that coke-burning *is* a natural use of a remote and barren field, and that coal-mining is not a natural use of a tract of land so limited that the necessary drainage of the mine can be accomplished only at the expense of one's neighbor.